Supreme Court, U.S.
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No. 03-

In the Supreme Court of the United States

BENJAMIN EGWAOJE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court can allow a criminal defendant to waive his Sixth Amendment right to counsel at trial, and therefore to exercise his correlative Sixth Amendment right to self-representation, without first conducting a detailed inquiry to ensure that the waiver was knowing and intelligent.

2. Whether this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), which established the Sixth Amendment right to self-representation at trial, should be overruled.

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INTRODUCTION

This case presents a question of fundamental importance to our criminal justice system: what courts must do before allowing criminal defendants to waive that most cherished of rights, the Sixth Amendment right to assistance of counsel. In this case, the Seventh Circuit upheld the district court's decision to allow petitioner to waive his right to counsel, despite the fact that the trial court provided only the barest of warnings about the consequences of doing so. In so concluding, the Seventh Circuit explicitly rejected the approach of other courts of appeals, which have required trial judges to conduct a detailed inquiry before allowing such a waiver. The Court's intervention is necessary to resolve this clear split in the circuits.

This case also presents the Court with an opportunity to reconsider its decision in *Faretta v. California*, 422 U.S. 806 (1975), which established a correlative Sixth Amendment right to self-representation at trial. Four Terms ago, in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), the Court cast substantial doubt on the reasoning of *Faretta*. The Court's decision in *Faretta* is inconsistent with a line of decisions holding that the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial. Where, as here, a criminal defendant is incapable of conducting his own defense in a credible manner, due process requires that a trial court have the discretion to insist that the defendant proceed with the assistance of counsel.

Finally, the Court may wish to hold this petition pending its decision in *Iowa v. Tovar*, No. 02-1541 (cert. granted Sept. 30, 2003). That case presents the question whether a trial court must warn a defendant about the usefulness of counsel at the guilty-plea stage. It seems unlikely that the Court's decision in *Tovar* will address the standard for waiver of the right to counsel at trial. Because *Tovar* has not yet been briefed on the merits, however, a hold for *Tovar* may be appropriate.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 335 F.3d 579 and reprinted in the appendix ("App.") at 2a-17a. The district court's unreported judgment is reprinted at App. 18a-23a.

JURISDICTION

The Seventh Circuit entered judgment on July 9, 2003. On September 10, 2003, Justice Stevens extended the time for filing this petition until November 6, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28 U.S.C. § 1654 states as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT

1. On July 17, 2001, petitioner Benjamin Egwaoje was arrested at a Chicago-area bank after he attempted to withdraw funds under an assumed name. *See* App. 3a. He was duly charged with two counts of actual and attempted credit-card

fraud under 18 U.S.C. § 1029. *See id.* at 4a. Mr. Egwaoje initially retained counsel, but that attorney subsequently withdrew on the grounds that Mr. Egwaoje had refused to meet with him and that there had been "substantial conflicts" between them. *See id.* A second attorney was then appointed for Mr. Egwaoje, but that attorney, too, subsequently withdrew, claiming that Mr. Egwaoje was refusing to meet and cooperate with him. *See id.* at 6a.

In February 2002, the district court appointed a third attorney, Richard Halprin, to represent Mr. Egwaoje. *See id.* The court set the trial date for April 2, 2002. *See id.* It appears that Mr. Egwaoje was not present when the trial date was set.

2. On the morning of trial, a dispute arose between Mr. Egwaoje and Mr. Halprin. *See* C.A. App. 17. Mr. Egwaoje asked to proceed *pro se* and asked for a 60-day continuance in order to prepare for trial. *See* App. 6a-7a. The district court denied Mr. Egwaoje's request for a continuance, accusing Mr. Egwaoje of "play[ing] games" by simultaneously demanding a speedy trial and seeking a continuance. C.A. App. 16. As to Mr. Egwaoje's request to waive his right to counsel and proceed *pro se*, the district court then commented as follows:

> THE COURT: I am ordering you to be quiet until I finish and then you may speak.
>
> Your choice today is, you may proceed as your own lawyer, in which case what I will do is, I will ask Mr. Halprin to remain here to give you advice in case you have questions as to legal procedures, because you may need assistance in that — or, you can have Mr. Halprin as your lawyer. Those are your two choices.
>
> If you wish to proceed pro se, you are entitled to do so. The United States Constitution guaranties [*sic*] your right to proceed as your own lawyer. If you wish to proceed as your own lawyer, I am required to admonish you. Even if I weren't required, I would admonish you

that to represent yourself in any criminal case is a foolish act. You will almost certainly make significant tactical errors. You will almost certainly put yourself in a position where even if you had a lawful defense, you would be unable to present in a coherent way. On top of it, you will not, I think, adequately preserve the record in this case if error has been made.

So I strongly advise you against representing yourself. But I do tell you that that is your decision. You may choose to represent yourself, or you may choose to have Mr. Halprin represent you. The choice is yours. Now you can speak.

C.A. App. 16-17. The following colloquy immediately ensued:

MR. EGWAOJE: If I may say something, this is the first time I am in open court. This is the first time I'm going to ask for a continuance. I need 30 days at least to prepare my defense. This lawyer is not representing me, and I don't want him to be my lawyer, we just had an outburst right there in the cage. I am telling you I need 30 days. This is the first time I am asking you for a continuance. To let my family know that I am going to trial —

THE COURT: I understand that you have a motion for a continuance, the motion for a continuance is denied.

MR. EGWAOJE: This is the first time. He don't have to be here because he is not representing me. He is no longer my lawyer, the record shows that.

THE COURT: You are choosing to represent yourself?

MR. EGWAOJE: The government and you as the Judge, with all due respect, is playing games —

THE COURT: Answer my question. Are you

choosing to represent yourself?

MR. EGWAOJE: I didn't start —

THE COURT: Despite the warnings that I have given you?

MR. EGWAOJE: I want to proceed, I am asking you for a continuance. You are denying me bond, which is unconstitutional. Now you are telling me you are not going to give me a week to prepare my defense so I can start —

THE COURT: That is exactly what I am telling you — that is exactly what I am telling you.

Now having denied your motion for a continuance, do you wish to represent yourself, which I will tell you again is a foolish thing to do, but it is your right to do it.

MR. EGWAOJE: He is not my lawyer, I don't know why he is standing her [*sic*].

THE COURT: You have to answer my question.

MR. EGWAOJE: Judge, you have not appointed me a lawyer —

THE COURT: Do you wish to represent yourself today. Do you wish to represent yourself in this trial which is going to begin today.

MR. EGWAOJE: I will pro se. I don't know why he is standing here.

THE COURT: By pro se, you do wish to represent yourself?

MR. EGWAOJE: Yes, I don't have a lawyer. Where is my lawyer at?

THE COURT: Thank you, that is all I need to know.

Id. at 17-19.[1] The court subsequently granted Mr. Egwaoje a two-hour break to prepare for trial, and counsel handed over the case file to Mr. Egwaoje. *See id.* at 32.

At trial, Mr. Egwaoje presented no witnesses or evidence in his defense, and offered no evidentiary objections. He was repeatedly warned for asking irrelevant questions and making argumentative statements during cross-examination of the government's witnesses. *See, e.g.*, D. Ct. Trial Tr. 47-48, 67-74, 75-76, 88-92, 101-04, 114-16, 125-27, 145-46, 149, 152-53, 167-74, 175-76. The district court cut short Mr. Egwaoje's opening statement, ordering him to "sit down," and repeatedly terminated Mr. Egwaoje's cross-examinations, similarly ordering him to "sit down" or "stop." *Id.* at 43, 116, 127, 153, 174. And the district judge twice held Mr. Egwaoje in contempt for interrupting him. *See id.* at 10, 137. Perhaps unsurprisingly, the jury found Mr. Egwaoje guilty on both counts. *See* App. 18a. The district court subsequently sentenced him to 27 months in prison on each count, to be served concurrently, and ordered restitution and supervised release. *See id.* at 19a-23a.

3. The Seventh Circuit affirmed. *See id.* at 2a-17a. The court began by recognizing that, in the wake of this Court's decision in *Faretta*, the inquiry as to whether the right to self-representation is properly invoked is merely the "converse[]" of the inquiry as to whether the right to counsel is properly waived. *See id.* at 9a. As to the latter, the court, citing one of its earlier decisions, stated that the inquiry turned on (1) whether the district court conducted a formal hearing into the defendant's decision to represent himself; (2) whether other evidence in the record established that defendant understood the disadvantages of self-representation; (3) the background and

---

[1] At a prior hearing, Mr. Egwaoje had indicated that he did not want to proceed *pro se* at trial, but instead wanted a new appointed lawyer. *See* D. Ct. Tr. 4 (Feb. 6, 2002).

experience of the defendant; (4) the context of the defendant's decision to proceed *pro se*. *See id.* at 9a-10a. The court reasoned that "[t]his is not a formalistic, mechanical, approach," and added that, "[r]egardless of the consideration of these individual factors, our inquiry at all times is directed to the record as a whole and we ask whether that record supports a knowing and intelligent waiver." *Id.* at 10a.

The Seventh Circuit then rejected Mr. Egwaoje's contention that, as a matter of law, the district court should have conducted a more thorough inquiry before allowing him to waive his right to counsel. *See id.* at 10a-11a. Specifically, the court refused to require district courts to use the model inquiry laid out in the federal benchbook. *See id.* at 10a. The court noted that "[o]ther courts of appeal[s] have adopted this *Miranda*-style prophylactic approach," *id.* (citing *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987)), but observed that the Seventh Circuit had not, and "reaffirm[ed] that position here," *id.* Again citing its earlier decisions, the court noted that, while it would be "prudent" for a trial court to conduct a more thorough inquiry, it was not required. *See id.*

Applying its lower standard for the waiver inquiry, the Seventh Circuit concluded that Mr. Egwaoje had knowingly and intelligently waived his right to counsel. *See id.* at 11a-13a. The court first noted that there was "no question that the [trial] court satisfied its obligation to warn Egwaoje of the dangers of self-representation." *Id.* at 11a. It added that Mr. Egwaoje was competent to stand trial and had attended two years of college. *See id.* The court noted that, although Mr. Egwaoje had never been to trial and had never before been charged federally, he was "no stranger" to the criminal justice system. *Id.* And the court contended that there was evidence suggesting that Mr. Egwaoje was "deliberately manipulating the system" in an attempt to create an appealable issue. *Id.* at 12a.

Finally, the Seventh Circuit rejected Mr. Egwaoje's argument that the district court should have refused to allow him to

represent himself on the ground that he lacked the ability to conduct his trial effectively. *See id.* at 13a. It cited this Court's precedents in concluding that such an argument was foreclosed. *See id.* The court also rejected Mr. Egwaoje's contentions that he did not receive a fair trial, that the district court erred by denying his request for a continuance, and that the district court failed adequately to explain the sentence it imposed. *See id.* This petition follows.

REASONS FOR GRANTING THE PETITION

A. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS REGARDING THE REQUISITE INQUIRY BEFORE A DEFENDANT CAN WAIVE HIS RIGHT TO COUNSEL AT TRIAL.

By refusing to require a trial court to conduct a detailed inquiry before allowing a defendant to waive his Sixth Amendment right to the assistance of counsel, the Seventh Circuit stands in conflict with other courts of appeals. Certiorari is warranted to resolve this split in the circuits. *See* S. Ct. R. 10(a).

1. Although this Court has long recognized that the right to counsel may be waived if the waiver is knowing and intelligent, *see, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), and that a trial court should indulge in every reasonable presumption against a waiver of that right, *see, e.g.*, *Brewer v. Williams*, 430 U.S. 387, 404 (1977), the Court has never definitively specified the inquiry that a trial court should conduct before allowing a defendant to waive the right to counsel. In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), a four-Justice plurality concluded that, in the context of a guilty-plea proceeding, a trial judge should "make a thorough inquiry and * * * take all steps necessary to insure the fullest protection of [the] constitutional right [to counsel] at every stage of the proceedings." *Id.* at 722 (plurality opinion). Writing for the plurality, Justice Black

listed a number of considerations of which the trial judge should inform the defendant before accepting a waiver:

> The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724.

Since the Court's decision in *Von Moltke*, the Court has recognized a correlative Sixth Amendment right to self-representation. *See Faretta*, 422 U.S. at 807. As a result, the inquiry whether a defendant has knowingly and intelligently waived his right to counsel is now coterminous with the inquiry whether a defendant is validly entitled to represent himself at trial. And in *Faretta* itself, the Court noted that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (internal quotation omitted); *see also United States v. Vonn*, 535 U.S. 55, 73 n.10 (2002) (citing *Faretta* for proposition that a defendant can choose self-representation only "after a warning from the court of the perils [it] entails"); *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (citing *Faretta* for proposition that "we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial"). Commentators have noted that language from *Faretta* "[a]rguably" suggests that a detailed inquiry is a "constitutional necessity" before a defendant can waive his right to counsel and

proceed *pro se*. 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 11.5(c), at 577 (2d ed. 1999).

2. In the absence of more specific guidance from this Court, the courts of appeals have irreconcilably split on whether a trial court must conduct a detailed inquiry before allowing a defendant to waive the right to counsel.

a. As the court below noted, several courts of appeals have "adopted [a] *Miranda*-style prophylactic approach" and required such a detailed inquiry. App. 10a. Most notably, in *McDowell*, the Sixth Circuit, invoking its supervisory powers, required district judges in the circuit to use the model inquiry laid out in the federal benchbook, or its material equivalent, before allowing a defendant to represent himself. *See* 814 F.2d at 249-50. The court acknowledged that, in the wake of this Court's decision in *Faretta*, district courts were left "in a much more difficult position," since "an overprotective judge who refuses to allow a defendant to jeopardize his own defense" and "a judge who does not make a copious inquiry into the thought process of the accused" could both be reversed. *Id.* at 248-49. Although the court noted that a majority of the other circuits then on record had refused to require a "deliberate and searching inquiry" before waiver could be found, *id.* at 249, and ultimately held that the defendant in the case had in fact knowingly and intelligently waived his right to counsel notwithstanding the absence of such an inquiry, *see id.*, it nevertheless prospectively ordered district courts in the circuit to use the model inquiry from the federal benchbook, or an inquiry "covering the same substantive points." *Id.* at 250. In its present form, the model inquiry proceeds as follows:

> 1. Have you ever studied law?
>
> 2 Have you ever represented yourself in a criminal action?
>
> 3. Do you understand that you are charged with these crimes: [*state the crimes with which the defendant*

is charged]?

4. Do you understand that if you are found guilty of the crime charged in Count I the court must impose an assessment of $50 and could sentence you to as many as ___ years in prison and fine you as much as $___? [*Ask defendant a similar question for each crime with which he or she may be charged in the indictment or information.*]

5. Do you understand that if you are found guilty of more than one of these crimes this court can order that the sentences be served consecutively, that is, one after another?

6. Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will affect your sentence if you are found guilty?

7. Do you understand that if you represent yourself you are on your own? I cannot tell you or even advise you how you should try your case.

8. Are you familiar with the Federal Rules of Evidence?

9. Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules?

10. Are you familiar with the Federal Rules of Criminal Procedure?

11. Do you understand that those rules govern the way a criminal action is tried in federal court?

[*Then say to defendant something to this effect:*]

12. I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to

represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?

14. Is your decision entirely voluntary?

1 Federal Judicial Center, *Benchbook for U.S. District Court Judges*, § 1.02, at 4-5 (4th ed. 1996). Since *McDowell* was decided, the Sixth Circuit has repeatedly reaffirmed its requirement that district judges use the model inquiry, or one like it, before a waiver can be found. *See, e.g., United States v. Modena*, 302 F.3d 626, 630 (6th Cir. 2002), *cert. denied*, 537 U.S. 1145 (2003); *United States v. Herrera-Martinez*, 985 F.2d 298, 301 (6th Cir. 1993); *United States v. Miller*, 910 F.2d 1321, 1324 (6th Cir. 1990).

b. Several courts of appeals, while not specifically mandating the use of the model inquiry, have similarly required that district judges conduct some form of inquiry before allowing waiver of the right to counsel. The Third Circuit has stated that a district judge should engage in a "searching inquiry" before finding waiver. *See United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982).[2] Although the Third Circuit did not require a "detailed listing of advice," *id.*, it noted that the

[2] Notably, the Third Circuit required a detailed inquiry even when the trial judge suspects that the defendant is "attempting to disrupt the administration of justice by manipulative requests for, and dismissals of, counsel." *United States v. Welty*, 674 F.2d 185, 193 (3d Cir. 1982). The Court reasoned that "even well founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *Id.* at 189.

district judge should "advise [the defendant] in unequivocal terms both of the technical problems he may encounter in acting as his own attorney and of the risks he takes if his defense efforts are unsuccessful," *id.* at 188. Thus, the district court "should tell the defendant, for example, that he will have to conduct his defense in accordance with the Federal Rules of Evidence and Criminal Procedure, rules with which he may not be familiar; that the defendant may be hampered in presenting his best defense by his lack of knowledge of the law; and that the effectiveness of his defense may well be diminished by his dual role as attorney and accused," and should also inform the defendant of the considerations listed in this Court's plurality opinion in *Van Moltke*. *Id.* at 188-89. The Third Circuit has since stated that the rule of *Welty* was constitutionally mandated, *see United States v. Peppers*, 302 F.3d 120, 135 (3d Cir.), *cert. denied*, 537 U.S. 1062 (2002), and that the model inquiry from the federal benchbook provided a "useful framework" for district courts to follow, *id.* at 136-37.

Similarly, the D.C. Circuit, like the Sixth Circuit, has exercised its supervisory powers to require that district judges "mak[e] clear on the record the awareness by defendants of the dangers and disadvantages of self-representation as to which the Supreme Court in *Faretta* has voiced its concern." *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982); *but see United States v. Klat*, 156 F.3d 1258, 1265 n.8 (D.C. Cir. 1998) (suggesting that "sustained colloquy" was not required because record "otherwise establishe[d]" knowing and intelligent waiver). The Tenth Circuit, while refusing to require a "precise litany," has stated that district judges "should conduct an inquiry sufficient to establish a defendant's knowledge and understanding of the factors articulated" in *Von Moltke*, and that the absence of such an inquiry "mandates" reversal of a finding of waiver. *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987); *see also United States v. Allen*, 895 F.2d 1577, 1578-79 (10th Cir. 1990) (same); *but see United States v.*

Willie, 941 F.2d 1384, 1389 (10th Cir. 1991) (upholding waiver where "surrounding facts and circumstances * * * demonstrate that [defendant] actually understood his right to counsel and the difficulties of *pro se* representation and knowingly and intelligently waived his right to counsel").[3]

c. Like the Seventh Circuit, other courts of appeals have held that district courts are not required to engage in *any* inquiry before a defendant can be found to waived the right to counsel. *See, e.g., United States v. Hafen*, 726 F.2d 21, 25-26 (1st Cir. 1984) (rejecting argument that a "district court must issue a particular warning or make specific findings of fact before it allows the defendant to proceed *pro se*"); *United States v. Tompkins*, 623 F.2d 824, 828-29 (2d Cir. 1980) (noting that colloquy between judge and defendant is "generally required," but adding that requirement is "not absolute"); *United States v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988) (stating that failure to engage in colloquy does not "automatically render the proceedings unconstitutional"); *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985) (refusing to apply "bright-line" requirement of colloquy); *United States v. Stewart*, 20 F.3d 911, 917 (8th Cir. 1994) (finding valid waiver "if a district court adequately warns a defendant or if, on the record as a whole, we determine that the defendant knew and understood the disadvantages of self-representation"); *United States v. Keen*, 104 F.3d 1111, 1114-15 (9th Cir. 1996) (describing inquiry as "preferred procedure"); *Strozier v. Newsome*, 926 F.2d 1100, 1108 (11th Cir. 1991) (noting that hearing is "preferred," but that "in rare cases" record might support waiver even in absence

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[3] Similarly, some highest state courts, often acting in accordance with court rules, have required a detailed inquiry. *See, e.g., State v. Young*, 626 So. 2d 655, 657 (Fla. 1993) (holding that reversal is required in absence of "proper *Faretta* inquiry"); *People v. Adkins*, 551 N.W.2d 108, 118 (Mich. 1996) (refusing to require trial court to engage in "word-for-word litany approach," but requiring "substantial compliance" with inquiry requirement); *Commonwealth v. Brazil*, 701 A.2d 216, 219 (Pa. 1997) (requiring that trial courts engage in "full and complete waiver colloquy" on record).

of hearing) (internal quotation omitted).[4]

3. Commentators have recognized that the lower courts are divided on the extent to which an inquiry must be conducted before a defendant can waive the right to counsel. *See, e.g.*, 3 LaFave, Israel & King, *supra*, § 11.5(c), at 576-80. In fact, two members of this Court, in dissenting from the denial of certiorari in the Sixth Circuit's *McDowell* case, urged that the Court intervene to resolve the circuit split on this issue. *See McDowell v. United States*, 484 U.S. 980 (1987) (White, J., dissenting). Writing for himself and Justice Brennan, Justice White observed that, "[s]ince *Faretta*, lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when 'knowing and intelligent' and 'with eyes open.'" *Id.* He then noted that the approach of the Sixth, Third, and D.C. Circuits conflicted with that of the First, Second, Seventh, and Ninth Circuits, which had taken the position that "no specific inquiries or special hearings must be conducted" before a defendant could waive the right to counsel. *Id.* That conflict, he continued, "ha[d] * * * gained the attention of, and been a source of confusion to, the state courts as well." *Id.* Since Justice White's dissent from the denial of certiorari, all of the remaining federal courts of appeals have spoken on the issue, and some of the courts of appeals that had already spoken have refined their position. To the extent it was not in 1987, therefore, the issue is therefore now ripe for this

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[4] Other highest state courts have also held that an inquiry is not always necessary. *See, e.g., State v. Wilson*, 564 N.W.2d 241, 251 (Neb. 1997) (noting that warnings are "not required" and that "[a] knowing and intelligent waiver can be inferred from conduct") (internal quotation omitted); *Hickey v. State*, 846 P.2d 289, 292 (Nev. 1993) (concluding, following Ninth Circuit, that "omission of a *Faretta* canvass is not reversible error"); *State v. Crisafi*, 608 A.2d 317, 325 (N.J. 1992) (noting, citing Eleventh Circuit, that "the absence of a searching inquiry will not undermine the waiver of counsel" in "rare cases").

Court's consideration.

4. This case provides a perfect vehicle to address whether a trial court must conduct a detailed inquiry before allowing a defendant to waive the right to counsel. It is indisputable that, if the Seventh Circuit had followed the Sixth Circuit's approach and measured the district judge's brief warning against the model inquiry in the federal benchbook, it would have invalidated, rather than upheld, Mr. Egwaoje's waiver of the right to counsel. Indeed, only *one* of the fourteen requirements of the benchbook inquiry — the requirement that the defendant be warned about the dangers of proceeding with self-representation — was even arguably satisfied here. *See* C.A. App. 16-17. In the brief colloquy preceding Mr. Egwaoje's waiver, the district judge did not recite the charges against Mr. Egwaoje; did not inform Mr. Egwaoje of the sentence he faced if he was found guilty; and did not advise Mr. Egwaoje about the governing rules at trial. Nor can the judge's failure to engage in a more detailed inquiry be treated as harmless. *Cf. Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967) (noting that right to assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). This Court should grant certiorari, and hold that the minimal warning that Mr. Egwaoje received was inadequate to enable him knowingly and intelligently to waive his right to counsel.

B. THIS COURT SHOULD RECONSIDER ITS DECISION IN *FARETTA v. CALIFORNIA*.

Even if this Court were to conclude that Mr. Egwaoje knowingly and intelligently waived his right to counsel, this case also presents an ideal opportunity for the Court to revisit its underlying decision in *Faretta*, which established the Sixth Amendment right to self-representation at trial. Because the Seventh Circuit stated that the inquiry as to whether the right to self-representation is properly invoked is merely the "converse[]" of the inquiry as to whether the right to counsel is

properly waived, *see* App. 9a, and because the Seventh Circuit rejected Mr. Egwaoje's argument that the district court should have refused to allow him to represent himself on the ground that he lacked the ability to conduct his trial effectively, *see id.* at 13a, the question whether a criminal defendant has the automatic right to represent himself after validly waiving his right to counsel is squarely presented here. Having cast substantial doubt on the rationale of *Faretta* in its recent decision in *Martinez*, the Court should take this opportunity to reconsider *Faretta* more directly, and hold that a trial court has discretion, in appropriate circumstances, to insist that a defendant proceed with the assistance of counsel.

1. In *Faretta*, the Court (per Stewart, J., joined by Douglas, Brennan, White, Marshall, and Powell, JJ.) began by observing that the right of self-representation had been protected by statute since the early days of the Republic. *See* 422 U.S. at 812-13 (citing 28 U.S.C. § 1654). The Court noted that the constitutions of 36 States expressly conferred the right, *see id.*, and that the Court (albeit in dictum) and lower federal and state courts had previously indicated that such a right existed as a matter of federal constitutional law, *see id.* at 813-16.

The Court proffered three principal justifications for its conclusion that Sixth Amendment guaranteed a right to self-representation. *First*, the Court asserted that the "structure of the Sixth Amendment" supported such a right. *Id.* at 818. It reasoned that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Id.* at 819. While acknowledging that the right to self-representation was "not stated in the Amendment in so many words," the Court contended that such a right was "necessarily implied" by the Sixth Amendment's structure. *Id.* It added that the counsel provision of the Sixth Amendment spoke only of "assistance" of counsel, and that "[t]he language and the spirit of the Sixth Amendment contemplate that counsel, like the other defense

tools guaranteed by the Amendment, shall be an aid to a *willing* defendant." *Id.* at 820 (emphasis added).

Second, the Court asserted that the "implie[d]" right of self-representation in the Sixth Amendment was reinforced by the amendment's roots in English legal history. *See id.* at 821. It noted that the Star Chamber was the only English tribunal in which unwilling criminal defendants were forced to have counsel, and that a defendant before the Star Chamber was considered to have confessed unless counsel agreed to sign an answer to the indictment. *See id.* at 821-22. After the Star Chamber was abolished, defendants were *required* to represent themselves in all cases, and later in all felony prosecutions. *See id.* at 823. In fact, the Court noted, the ban on counsel in felony cases was not entirely eliminated until 1836, and Parliament did not provide for the court appointment of counsel until even later. *See id.* at 825.

Third, the Court contended that insistence on the right to self-representation was even "more fervent" in the American colonies than it had been in England. *Id.* at 826. According to the Court, "[t]he colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers." *Id.* Although the Court conceded that colonial courts, unlike English courts, allowed felons the aid of the counsel, it noted that "the basic right of self-representation was never questioned." *Id.* at 827-28. The Court added that "[t]he right of self-representation was guaranteed in many colonial charters and declarations of rights," *id.* at 828, and, upon the formation of the Nation, "entered the new state constitutions in wholesale fashion," *id.* at 829. The Court again recognized that the Judiciary Act of 1789 gave defendants the right to "'plead and manage their own causes personally or by the assistance of * * * counsel,'" *id.* at 831 (quoting 28 U.S.C. § 1654), and noted that, "[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate

or comment on the issue," *id.* at 832. The Court therefore concluded that "[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation." *Id.*

The Court conceded that "[t]here can be no blinking the fact that the right of an accused to conduct his own defense seems to conduct against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." *Id.* (citing, *inter alia*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932)). It noted that "the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial." *Id.* at 832-33. And it recognized that "a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." *Id.* at 833. The Court summarily rejected that argument, however, reasoning that it was "one thing" to hold that a defendant had the right to the assistance of counsel and "quite another" to compel a defendant to accept a lawyer he did not want. *Id.*

The Court also conceded that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. But it noted that "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction," and that "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.*

Chief Justice Burger, joined by Justice Blackmun and then-Justice Rehnquist, dissented. He criticized the Court for indulging "the judicial tendency to constitutionalize what is thought 'good,'" and added that "there is nothing desirable and useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his

own defense to criminal charges." *Faretta*, 422 U.S. at 836 (Burger, C.J., dissenting). He rejected the Court's argument that the right to self-representation is "tucked between the lines of the Sixth Amendment," noting that "the conclusion that the right[s] guaranteed by the Sixth Amendment are 'personal' to an accused reflects nothing more than the obvious fact that it is he who is on trial and therefore has need of a defense." *Id.* at 837. "[I]n all but an extraordinarily small number of cases," Chief Justice Burger continued, "an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." *Id.* at 838. He rejected the argument that "the quality of his representation at trial is a matter with which only the accused is legitimately concerned," reasoning that the prosecution, the judge, and the public at large all had an interest in ensuring that justice is achieved in every criminal trial. *Id.* at 839. As to precedent, Chief Justice Burger reasoned that the majority's rule had not been even "hinted at" in the Court's previous decisions, and in fact represented a "perversion" of decisions such as *Argersinger* and *Gideon*. *Id.* at 843. And he contended that the provision of a *statutory* right to self-representation in the Judiciary Act of 1789 weighed against, not in favor of, the finding of a *constitutional* right to self-representation in the contemporaneously drafted Sixth Amendment. *See id.* at 844.

Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, also dissented. He stated that it was "self-evident" that the Sixth Amendment made no direct reference to self-representation, and noted that the Court had previously rejected the argument that the ability to waive a constitutional right (here, the right to assistance of counsel) necessarily implied the right to insist upon the opposite of that right (here, the right to self-representation). *See Faretta*, 422 U.S. at 847 (Blackmun, J., dissenting) (citing *Singer v. United States*, 380 U.S. 24 (1965)). He reasoned that, while the guarantees of the Sixth Amendment were "personal to the accused," the Sixth

Amendment did not guarantee "any particular procedural method of asserting those rights." *Id.* at 848. According to Justice Blackmun, therefore, nothing in the Constitution "requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical — albeit voluntary — caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification." *Id.* at 849. As for the Court's historical evidence, Justice Blackmun reasoned that it was "equally plausible" that the silence of the Sixth Amendment as to the right of self-representation indicated that the Framers were simply not thinking about self-representation when they drafted it. *See id.* at 850. He added that the Court's subsequent cases elaborating the right to counsel were, as the Court recognized, "based on the premise that representation by counsel is essential to ensure a fair trial." *Id.* at 851. He concluded that the Court's decision would lead to a "drastic curtailment of the interest of the State in seeing that justice is done in a real and objective sense." *Id.*

2. In *Martinez*, the Court took up the question whether a defendant had the constitutional right to self-representation on appeal. Although the Court could readily have distinguished *Faretta* on the ground that the Sixth Amendment does not attach on appeal, *see Martinez*, 528 U.S. at 160, the Court (per Stevens, J., joined by the entire Court except Scalia, J.) went out of its way to address, and criticize, each of the articulated justifications for the rule in *Faretta*. As to *Faretta*'s historical evidence, the Court discounted that evidence on the ground that "it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime." *Id.* at 156. For that reason, "a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a 'right' to take shelter in the sewers of Paris." *Id.* at 157. And the Court noted that, in light of its decision in *Gideon v. Wainwright*, "an individual's decision to represent himself is no

longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation." *Id.* at 158. As a result, "the original reasons for protecting [the] right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need — although not always the desire — for self-representation." *Id.* As to *Faretta*'s analysis of the Sixth Amendment itself, the Court summarily characterized that analysis as "nontextual." *See id.* at 160.

The Court further noted that "[n]o one, including Martinez and the *Faretta* majority, attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient." *Id.* at 161. In fact, the Court acknowledged that some critics had argued that allowing a defendant to proceed *pro se* was akin to allowing him to waive his right to a fair trial. *See id.* at 161 n.9. And the Court added that, although the *Faretta* Court described the right to self-representation as "fundamental," representation by counsel was the standard, rather than the exception. *See id.* at 161. The Court noted that the right to self-representation was "not absolute," and added, without elaboration, that "[e]ven at the trial level, * * * the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 161-62.

Justice Kennedy concurred. He noted that it was "unnecessary" to cast doubt upon *Faretta*'s rationale in order to decide the case. *See* 528 U.S. at 164 (Kennedy, J., concurring). He concluded that, even accepting the validity of *Faretta*, "it does not follow that a convicted person has a similar right of self-representation on appeal," since "[d]ifferent considerations apply in the appellate system." *Id.*

Justice Breyer also concurred. He observed that "judges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*'s] holding," but noted the absence of empirical evidence that *Faretta*'s holding has proven "counterproductive in practice." 528 U.S. at 164-65

(Breyer, J., concurring). For that reason, he concluded that the Court was "not in a position to reconsider the constitutional assumptions that underlie that case." *Id.* at 165.

Finally, Justice Scalia concurred only in the judgment. He indicated that he "d[id] not share the apparent skepticism" of the majority about *Faretta*, and, alone among the Justices writing in *Martinez*, expressed the view that, while he might have relied on the Due Process Clause rather than the Sixth Amendment, *Faretta* was correctly decided. 528 U.S. at 165 (Scalia, J., concurring in the judgment). He reasoned that the mere fact that asserting the right to self-representation may often, or even usually, work to the defendant's disadvantage was irrelevant. *See id.* But he concluded that the instant case could readily be decided on the ground that there is no constitutional right to appeal, and therefore that the State could require all appeals to be prosecuted through counsel. *See id.* at 165-66.

3. The Court should grant certiorari in this case to resolve the lingering uncertainty about the validity of *Faretta* in the wake of the Court's decision in *Martinez*. As the Court is aware, *see Martinez*, 528 U.S. at 161 n.10, *Faretta* has been the object of substantial criticism, *see, e.g.*, Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000); John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 Seton Hall Const. L.J. 483 (1996).

Faretta has principally been attacked for elevating a defendant's interest in autonomy over the defendant's, and society's, interest in the fairness of criminal proceedings — in contravention of this Court's many other cases emphasizing that the assistance of counsel is necessary to ensure a fair trial. *See, e.g.*, Sabelli & Layton, *supra*, at 208-11; *see generally Wheat v.*

United States, 486 U.S. 153, 160 (1988) (discussing "institutional interest in the rendition of just verdicts in criminal cases"); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (describing right to fair trial as "the most fundamental of all freedoms"). In the words of one critic, "[*Faretta*] completely ignores how self-representation in criminal trials will affect the public who views such cases — whether that public is the jury in the case or the wider public watching the case on TV — and thus risks undermining public confidence in the criminal justice system." Tracey L. Meares, *What's Wrong With Gideon*, 70 U. Chi. L. Rev. 215, 227 (2003) (footnote omitted). As recent high-profile cases involving *pro se* defendants amply demonstrate, the risk that self-representation will undermine confidence in the criminal justice system is a very real one.[5]

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[5] Since asserting his right to represent himself, Zacarias Moussaoui, the only person thus far charged with involvement in the 2001 terrorist attacks, has "insulted his standby lawyers, blasted the judge and taunted the Justice Department with a stream of blistering handwritten motions and courtroom outbursts." Jerry Markon, *Moussaoui Is Spinning a Legal Web*, Wash. Post, May 27, 2003, at A1. Partly for that reason, while "[t]he government and others boasted that Moussaoui would receive swift justice in an open courtroom as a showcase for the world about the fairness of the U.S. judicial system," "[n]ow those same people say privately that the system has been turned on its head." *Id.*

More recently, John Allen Muhammad asserted his right to represent himself, albeit temporarily, in his capital murder trial stemming from his alleged participation in the 2002 Washington sniper attacks. One pundit described his opening statement as "about as legally compelling as a Lewis Carroll poem." Dahlia Lithwick, *Court-Assisted Suicide: Why Only Serial Killers Have a Right to Die*, Slate, Oct. 21, 2003, *available at* http://slate.msn.com/id/2090132. The following excerpt from that statement is representative:

> Well, the whole truth. What is the whole truth? The whole truth, what I found out when I asked that is, Don't take anything away from the truth, which means when we take something away from it, it's not a whole anymore. If we do that, that's a lie. If we do that, we are deceiving. What's nothing but the truth? Well, that means you don't add nothing to the truth. If we do that, we deceiving.

This case would have been a particularly apt one in which to require the defendant to proceed with the assistance of counsel, because Mr. Egwaoje was evidently incapable of conducting a serious defense. Although Mr. Egwaoje may have been competent to stand trial (and therefore, under this Court's precedents, competent to waive his right to counsel, *see Godinez v. Moran*, 509 U.S. 389, 399, 402 (1993)), it was clear from the colloquy that he was unlikely to be able to mount a competent *defense*. And it is clear that Mr. Egwaoje's defense in fact proved to be egregiously deficient. Mr. Egwaoje presented no witnesses or evidence, offered no evidentiary objections, was repeatedly admonished for his conduct in cross-examination, and was twice even held in contempt. Where a trial court perceives that a criminal defendant is incapable of conducting his own defense in a credible manner, and therefore incapable of receiving a fair trial, the court should have the discretion to insist that the defendant proceed with the assistance of counsel.

Finally, to the extent that the Court does not wish to revisit its decision in *Faretta* directly, the dubious vitality of the right to self-representation suggests, at a minimum, that the Court should erect a high bar before allowing a defendant to waive the correlative right to counsel. If the Court chooses not to grant certiorari on the question whether *Faretta* should be overruled, therefore, the Court should at least grant certiorari on the threshold question and hold that trial courts should engage in a

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> We are telling a lie, so this is why it's important that we tell the whole truth and nothing but the truth. But how do we jump from the truth to the whole truth to nothing but the truth when at one time all we had was the truth? Jesus said, "You shall know the truth." He didn't say you shall know the whole truth and nothing but the truth. The truth. For what happened between that time and this time to where we got to deal with three truths?

John Allen Muhammad's Opening Statement, Oct. 20, 2003, *available at* http://www.cnn.com/2003/LAW/10/20/muhammad.statement/index.html.

detailed inquiry before allowing a defendant to embark on the risky course of proceeding *pro se*. Especially in light of the Court's decision in *Martinez*, however, petitioner respectfully submits that the Court should grant certiorari on both questions and take this opportunity to clarify whether *Faretta* remains good law.

C. THE COURT MAY WISH TO HOLD THIS PETITION FOR *IOWA v. TOVAR*.

Finally, the Court may wish to consider holding this petition pending its decision in *Iowa v. Tovar*. That case presents the question whether a trial court must specifically warn a defendant about the usefulness of counsel at the guilty-plea stage.

In *Patterson*, this Court suggested that the prerequisites for waiver of the right to counsel at the guilty-plea stage were discrete from the prerequisites for waiver of that right at trial:

> At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification * * *. At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

487 U.S. at 298 (citations omitted). Even the petitioner in *Tovar* has recognized that a "much more searching inquiry" is

required before the right to counsel can be waived at trial than at earlier stages of criminal proceedings. 02-1541 Pet. 12.

It seems likely, therefore, that the Court's decision in *Tovar* will not address the requirements for waiver of the right to counsel *at trial*, much less the ongoing validity of the right to *self-representation* at trial. Because none of the merits briefs have yet been filed in *Tovar*, however, the full scope of the issues raised in *Tovar* is not yet clear. Out of an abundance of caution, therefore, a hold for *Tovar* may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, or at a minimum held pending this Court's disposition of *Iowa v. Tovar*, No. 02-1541.

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